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LEGAL ETHICS AND THE PROSECUTING ATTORNEY

JOHN O. KIZER*

One of the more perplexing problems arising out of the attorney-client relationship is that of conflicts of interest, the propriety of dual representation, or the representation of differing interests. This problem arises every day in the average lawyer's practice. It is, of course, intensified as the number of lawyers associated in practice increases. Almost every law firm of any size has some procedure designed to avoid conflicts of interest and improper dual representation.

The problem of conflicts of interest is present to a high degree in the West Virginia system which permits county prosecuting attorneys to engage in private practice. Perhaps an examination of the nature and duties of the office of prosecuting attorney will lead to an understanding of how these problems arise and will help one to recognize when they exist.

The prosecuting attorney in West Virginia is a constitutional officer.¹ Although there is no provision of the constitution or of any statute defining the qualifications or requirements necessary to be eligible to hold the office of prosecuting attorney, the West Virginia Supreme Court of Appeals has held that a person who is not an attorney, duly licensed or authorized to practice law in the courts of this state, is ineligible to hold the office.² At common law, a prosecuting attorney "is the representative of the public in whom is lodged a discretion . . . , which is not to be controlled by the courts or *by an interested individual*. . . ."³ In *State v. Doyle*,⁴ the court said:

In all our States, the prosecuting officer acts under a discretion committed to him for the public good. He is not, as of course, to pursue to conviction every offender against whom he can

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¹ W. VA. CONST. art. 9, § 1.

² *State ex rel. Dostert v. Rigglemen*, 155 W. Va. 808, 187 S.E.2d 591 (1972); *Summerfield v. Maxwell*, 148 W. Va. 535, 135 S.E.2d 741 (1964).

³ *Ganger v. Peyton*, 379 F.2d 709, 713 (4th Cir. 1967), *quoting* *United States v. Brokaw*, 60 F. Supp. 100, 101 (S.D. Ill. 1945).

⁴ 64 W. Va. 366, 62 S.E. 453 (1908).

obtain adequate evidence. Nor is it his duty to convict every prosecuted person of the highest offense which can be carved out from the mass of his entire evil-doings. It is among the most important functions of a State's attorney to select, out of what the law permits, the charges which he will bring against offenders.⁵

The Supreme Court of Appeals of Virginia, while recognizing the prosecutor's wide authority in instituting prosecutions, has stressed the responsibility commensurate with this authority.⁶ According to the supreme court, the prosecuting attorney's power to institute prosecutions should be "exercised with caution and only in cases where, after a proper investigation, he is reasonably satisfied of the guilt of the person suspected of crime."⁷ The Virginia court explained that the prosecutor's duty to protect members of the public from unjustified prosecution is equally as important as his duty to prosecute members who are guilty.⁸

The prosecuting attorney represents the state within his county. The state is his primary client. The office of prosecuting attorney has been carved by the legislature out of that of attorney general and has been made an independent office having, to some extent, exclusive control of the business of the state arising within the county.⁹ While the attorney general may assist the prosecutor in the prosecution of the state's business or perform it himself in case of the nonaction of the prosecutor, he cannot displace the prosecutor. The attorney general has neither power of removal nor control over the prosecuting attorney within the latter's own province as it is defined by statute.¹⁰ The law requires the prosecuting attorneys of the various counties to look after carefully and to give attention to the general interests of the county.¹¹

The duties of the prosecuting attorney are statutorily prescribed as follows:

It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected and qualified, and when he has information of the

⁵ *Id.* at 368-69, 62 S.E. at 454, *quoting* 1 BISHOP, CRIMINAL LAW § 815(a).

⁶ *Macon v. Commonwealth*, 187 Va. 363, 373, 46 S.E.2d 396, 401 (1948).

⁷ *Id.*

⁸ *Id.*

⁹ *State v. Ehrlick*, 65 W. Va. 700, 64 S.E. 935 (1909).

¹⁰ *Id.*

¹¹ *Painter v. Heironimus*, 97 W. Va. 579, 587, 125 S.E. 525, 528 (1924).

violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender, and may in such case issue or cause to be issued a summons for any witness he may deem material. Every public officer shall give him information of the violation of any penal law committed within his county. It shall also be the duty of the prosecuting attorney to attend to civil suits in such county in which the State, or any department, commission or board thereof, is interested, and to advise, attend to, bring, prosecute or defend, as the case may be, all matters, actions, suits and proceedings in which such county or any county board of education is interested.¹²

The statute further provides that it shall be the duty of the prosecuting attorney, when requested by the attorney general, to perform or assist the attorney general in performing, in the county in which the prosecutor is elected, any legal duties required to be performed by the attorney general that are not inconsistent with the duties of the prosecuting attorney as the legal representative of such county.¹³ The prosecuting attorney may also be required to perform or to assist the attorney general in performing any legal duties required of the attorney general in any county other than that in which the prosecutor is elected, for which he shall be paid his actual expenses.¹⁴

Thus, by statute, the prosecuting attorney must represent the state in all criminal matters.¹⁵ He is also the attorney in his county for the state or any department, commission, or board thereof in any civil suit in which they are interested.¹⁶ He must also act as legal representative of the county commission and the county board of education.¹⁷

The *West Virginia Code* authorizes counties having populations of 100,000 or more to employ legal counsel.¹⁸ It also authorizes county boards of education to employ legal counsel.¹⁹ In any county where the county commission has its own legal counsel and the

¹² W. VA. CODE ANN. § 7-4-1 (1976 Replacement Volume).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* § 7-4-3.

¹⁹ W. VA. CODE ANN. § 18-5-13(10) (1977 Replacement Volume).

county board of education has separate counsel, the prosecutor is relieved of the duty of representing them. This does not, however, alter the basic considerations involved in conflicts of interest problems.

Canon 6 of the old *Code of Professional Ethics* required a lawyer to disclose to his client his relations to the parties and, if any, his interest in or connection with the controversy. This was to be done at the time of retainer, as the mandated disclosure might influence the client's selection of counsel.²⁰ Further, the canon denounced as "unprofessional" the representation of conflicting interests without the express consent, given after a full disclosure of the facts, of all those concerned.²¹ The duty to avoid conflicts of interest extended to prohibit accepting subsequent employment regarding "matters adversely affecting any interest of [a] client with respect to which confidence [had] been reposed."²² This continued preclusion flowed from the obligation of an attorney to represent his client "with undivided fidelity and not to divulge his secrets or confidences."²³

Canon 5 of the present *Code of Professional Responsibility* provides: "A lawyer should exercise independent professional judgment on behalf of a client."²⁴ According to a corresponding ethical consideration,²⁵ a lawyer's professional judgment should be exercised, within legal boundaries, solely for the benefit of his client. The attorney should be free of interests—interests of his own, those of other clients, or those of third parties—which might compromise his professional judgment or lessen his loyalty to his client.²⁶

In order to maintain the independence of his professional judgment, a lawyer must not accept or continue employment that will "adversely affect his judgment on behalf of or dilute his loyalty to a client."²⁷ The ethical consideration notes the appearance of this problem whenever a lawyer is requested to represent multiple

²⁰ ABA CANONS OF PROFESSIONAL ETHICS No. 6.

²¹ *Id.* The canon defined representation of conflicting interests as a situation in which "in behalf of one client, it is [the attorney's] duty to contend for that which duty to another client requires him to oppose." *Id.*

²² *Id.*

²³ *Id.*

²⁴ ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON 5.

²⁵ *Id.* ETHICAL CONSIDERATION [hereinafter cited as EC] 5-1.

²⁶ *Id.*

²⁷ *Id.* EC 5-14.

clients with interests somehow discordant.²⁸ When presented with the dilemma of representing two or more clients having potentially different interests, the lawyer is forced to balance: he "must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment."²⁹ All doubts about the propriety of the situation should be resolved against representation. A lawyer is never justified in representing in litigation multiple clients with differing interests.³⁰ Although there are a few cases in which litigating for two or more clients with *potentially* differing interests would be justified, such representation is discouraged. Because the potential difference's becoming a reality would require withdrawal from representation by the attorney and likely result in hardship on the clients, "it is preferable that [the lawyer] refuse the employment initially."³¹ There are, however, many nonlitigious situations in which an attorney may properly serve two or more clients with potentially differing interests. If the interests are only slightly discordant, it is likely that the lawyer can retain his independent judgment for each client. Moreover, even if the interests become actually different, the lawyer's withdrawal is likely to be less disruptive to the client than it would be in a litigious matter.³² Nevertheless, a further ethical consideration states:

In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is . . . essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires.³³

Such a requirement necessitates full disclosure on the part of the attorney; he must explain to each client the implications of multiple representation and should advise the clients of any circumstances that might bear on his undivided loyalty. After disclosure, the lawyer should accept or continue representation only if the clients consent.³⁴

While consent may be given by private clients, thus avoiding

²⁸ *Id.*

²⁹ *Id.* EC 5-15.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* EC 5-16.

³⁴ *Id.*

the problem of any conflict of interest, it cannot be given in the case of a public officer. It has been generally held by the Committee on Professional Ethics of the American Bar Association and by other associations that, in the case of the public or the state, consent to dual representation or conflicts cannot be given. In a 1929 formal opinion, the ABA stated:

So long as the partnership relation continues between the county prosecutor and his professional associate, it is clearly unethical for one member of the firm to oppose the interests of the state while the other member represents those interests. The positions are inherently antagonistic and this would be so irrespective of Canon 6. No question of consent can be involved as the public is concerned and it cannot consent.

In many communities it is the privilege of a prosecutor to continue in the private practice of law during his term of office, but this in no way alters the foregoing conclusions. The prosecutor himself cannot represent both the public and the defendant and neither can a law firm serve two masters. It follows that a partner in such a firm must forego the representation of defendants whose prosecution is the duty of another member who represents the public.³⁵

The committee's holding that the public is unable to consent was reaffirmed in a later opinion.³⁶ Regarding a situation in which the duties of the city attorney or his assistants included prosecuting violators of criminal statutes or municipal ordinances, it was determined improper for any of them to represent a criminal defendant while they held offices which made any of them a prosecutor. Recognizing that representation of conflicting interests without the "express consent of all concerned after a full disclosure of the facts"³⁷ is condemned by canon 6 as unprofessional, the committee stated: "The consent clause in the Canon could not operate in the case of a public officer."³⁸

The Committee on Professional Ethics of the New York State Bar Association [hereinafter referred to as NYSBA] issues many formal opinions. These opinions on legal ethics questions are highly regarded. In response to one inquiry, the NYSBA held: "Service by a lawyer in a public capacity carries the same restric-

³⁵ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 16 (1929).

³⁶ *Id.*, No. 34 (1931).

³⁷ *Id.*

³⁸ *Id.*

tions as to conflict of interest as service for private clients."³⁹ The committee answered the specific question involved in the case by disapproving representation by the district attorney of both the public interest and persons being prosecuted by the district attorney's office. Further, the prohibition against such representation was held to extend to the law partners and associates of the district attorney.⁴⁰ The NYSBA committee followed the ABA's disallowance of consent: "No question of consent is involved because the public cannot give its consent to a conflict of interest."⁴¹ This decision was supported by dicta in a later opinion, which noted the series of ABA opinions in which "it has been held that consent which may make representation of conflicting interests unobjectionable cannot be authorized by a person standing in an official position."⁴²

It is quite clear, then that, while consent may render some conflicts of interest unobjectionable in the private sector, consent can never render a conflict of interest unobjectionable where the public is concerned. The public cannot consent to a conflict of interest. Thus, we may conclude from the foregoing that a prosecuting attorney could not represent any interest against the State of West Virginia, whether it be criminal or civil. There may be some minor exceptions to this broad general rule. However, the safest course for a prosecutor to follow is to refuse to represent any client in a matter in which the State of West Virginia, the county commission, or the county board of education is interested.

In 1964 the Committee on Ethics and Professional Responsibility of the American Bar Association was again called upon to give its opinion with respect to the propriety of a prosecuting attorney's engaging in private practice.⁴³ The committee said:

In all of [our previous decisions dealing with this question] we have held that where permitted by law a prosecuting attorney may engage in private practice so long as there is no conflict of

³⁹ NYSBA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 40, *citing* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 128 (1935).

⁴⁰ NYSBA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 40, *citing* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 142 (1935); ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 284.

⁴¹ NYSBA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 40, *citing* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 16 (1929).

⁴² NYSBA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 110.

⁴³ ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. C-772 (1964).

interest involved.⁴⁴ However, in Opinion 135 we warned: "The attempted double role is fraught with many conceivable inconsistencies and antagonisms. Public duty and fealty to private client, involving subordination of the interest of one or the other, may embarrassingly challenge the conscience of the lawyer who attempts to serve both."

Of course, the lawyer who attempts to act in both capacities should not accept any private employment where any such inconsistencies and antagonisms exist, and should immediately withdraw should they develop after employment.⁴⁵

This general warning is rather broad and vague and is of little help to the average prosecuting attorney in deciding whether in a particular situation there is a conflict of interest. It would be impossible to detail here all of the cases which have been decided or to detail all of the situations which might arise in the day-to-day practice as a lawyer and as a prosecuting attorney. However, the author will attempt to give a few of the opinions which have been decided from time to time by the ABA and other opinion-giving agencies.

First of all, the *West Virginia Trial Court Rules* forbid the representation of criminal defendants by a prosecuting attorney, an assistant prosecuting attorney, or the partner or office associate of either in any state court.⁴⁶ One member of a law firm may not represent defendants in criminal cases which are being prosecuted by another member of the firm who holds the office of prosecuting attorney.⁴⁷ Further, it has been held improper for an assistant prosecutor or his partner to defend a client in a criminal case.⁴⁸ More-

⁴⁴ *I.e.*, ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 278 (1948); *id.*, No. 262 (1944); *id.*, No. 135 (1935).

⁴⁵ ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. C-772 (1964).

⁴⁶ W. VA. TRIAL Ct. R. IV(c), providing:

Neither the prosecuting attorney, nor the assistant prosecuting attorney of this county, nor the office associate or partner of either the prosecuting attorney or assistant prosecuting attorney of this county shall appear as counsel for defendant in any criminal case pending in this court, nor shall the prosecuting attorney or assistant prosecuting attorney of any other county appear for the defendant in a criminal case pending in this court.

The effect of this rule is to forbid a prosecutor, an assistant prosecutor, or any partner or office associate of either to represent criminal defendants in the trial courts of the state.

⁴⁷ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 16 (1929).

⁴⁸ *Id.*, No. 142 (1935). See also note 46 *supra*.

over, a public prosecutor in one state may not ethically defend a person accused of a crime in another state, even though the case is to be tried in the other state and he took the case before being elected public prosecutor.⁴⁹

According to a 1931 opinion, a city attorney could defend a person charged with a crime if (1) his duties and his assistant's duties did not include the prosecution in any court of offenders against municipal ordinances or criminal statutes and (2) he was not required to defend the accused in any court in which a city official performed the duties of judge or magistrate.⁵⁰ This decision was modified in 1938, when the committee held that a county attorney who represents the county only with regard to civil matters may not represent a criminal defendant being prosecuted by the district attorney.⁵¹ However, a city attorney may represent indigent defendants in courts other than the one in which he prosecutes offenders for violations of municipal ordinances.⁵²

The West Virginia State Bar Committee on Legal Ethics has held that it is unethical to prosecute an accused in a criminal case and then represent his interests in a civil case.⁵³ Similarly, the ABA has said that a prosecuting attorney who is prosecuting a criminal charge against a defendant may not represent the defendant in a personal injury suit while the indictment is pending.⁵⁴

A prosecutor cannot profit by information gained in the course of performance of his duties as a public official. Thus, he is prohibited from participating in personal injury and property damage actions previously investigated through his office as involving criminal offenses.⁵⁵ For example, a prosecuting attorney who investigated a fire to determine whether the owner set it himself but did not gather enough evidence to criminally prosecute may not represent the owner in an action against the owner's insurer.⁵⁶ Further, a prosecuting attorney who investigated an automobile accident but determined that criminal prosecution was not warranted may

⁴⁹ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 30 (1931).

⁵⁰ *Id.*, No. 34 (1931), *modified, id.*, No. 186 (1938).

⁵¹ *Id.*, No. 186 (1938).

⁵² *Id.*, No. 55 (1931). The 1938 modification of opinion 34, *see* text accompanying notes 50 & 51 *supra*, apparently did not affect this decision.

⁵³ W. VA. S.B. COMM. ON LEGAL ETHICS, OPINIONS, No. 20 (1955).

⁵⁴ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 77 (1932).

⁵⁵ W. VA. S.B. COMM. ON LEGAL ETHICS, OPINIONS, No. 2 (1952).

⁵⁶ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 39 (1931).

not represent one of the parties to the accident in a civil suit, even though he is not specifically prohibited from engaging in private practice by state law.⁵⁷

A county attorney, whose duty it is to prosecute crimes committed within the county, may not, while in office, accept employment to obtain a pardon or parole of one convicted of a crime in another county.⁵⁸ Additionally, an attorney who represented a convict many times before the state pardon board must discontinue that representation upon his election to the office of county attorney when that office imposes upon him the duty of prosecuting crimes committed in the county.⁵⁹ Moreover, a member of the staff in a state's attorney's office cannot properly, after retirement, appear as counsel for a defendant whose case originated, was investigated, or was passed upon by either the lawyer involved or his associates while he was a member of the state's attorney's staff. This would apply likewise to prosecuting attorneys and their staffs.⁶⁰

A state prosecuting attorney permitted by law to carry on private practice may represent persons before federal boards and bureaus in matters involving federal laws exclusively if such representation will not interfere with the usual cooperative relations between state and federal prosecutors. He may not, however, represent criminal defendants before federal courts.⁶¹

Although a district attorney and his staff may be permitted to engage in private practice not in conflict with their official business, they may not, as private attorneys, represent a wife or a husband in domestic relations court or in a preliminary conference with a member of the probation staff to agree on a support order, when a member of the district attorney's staff may later be required by law to represent the prosecutrix in a support action.⁶² Further, it is also improper for the associates in private practice of the district attorney or his assistants to represent such individuals or to try cases in a criminal court.⁶³

⁵⁷ *Id.*, No. 135 (1935).

⁵⁸ *Id.*, No. 118 (1934).

⁵⁹ *Id.*, No. 136 (1935).

⁶⁰ *Id.*, No. 134 (1935).

⁶¹ *Id.*, No. 262 (1944).

⁶² ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 922 (1966).

⁶³ *Id.*

There are many perplexing problems which arise out of the duty of the prosecutor to represent the state and its various boards and agencies. For example, it would not be proper for the prosecuting attorney or any of his assistants to represent the property owner in a condemnation proceeding. While the West Virginia Department of Highways usually handles condemnation matters with its own trial attorneys, the Department may call upon the prosecuting attorney of the county for assistance or may ask him to handle the case. Several years ago this question was considered by the Committee on Legal Ethics. A prominent attorney had been employed by the State of West Virginia to handle its condemnation cases. He was also representing property owners in condemnation cases. The attorney for the Department's Right of Way Division consented to this arrangement. The Committee on Legal Ethics, however, held it was improper for the attorney to represent both the state highway department and property owners.

A further example of conflict of interest arose when an attorney was appointed as a part-time special assistant attorney general attached to the West Virginia Human Rights Commission. This attorney had a large practice before the West Virginia Court of Claims. The Committee on Legal Ethics was of the opinion that it would be improper for the attorney to represent clients against the State of West Virginia in the court of claims and at the same time be an assistant attorney general and counsel for the West Virginia Human Rights Commission.

Dual representation can have other serious ramifications so far as the public prosecutor is concerned. In a case in which the prosecuting attorney represented the defendant's wife in the prosecution of a divorce action which was pending at the time of the criminal action and was based upon the same alleged assault on the wife by the husband, Judge Craven, speaking for the Fourth Circuit, said:

We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the Commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment. . . . Because of the prosecuting attorney's own self-interest in the civil litigation (including the possibility that the size of his fee would be determined by what could be exacted from defendant), he was not in a position to exercise fair-minded judgment with respect to (1) whether to decline to prosecute, (2) whether to reduce the charge to a lesser

degree of assault, or (3) whether to recommend a suspended sentence or other clemency.⁶⁴

The judge went on to describe the duties and responsibilities of a prosecuting attorney, terming the prosecutor an officer of the court with a quasi-judicial position.⁶⁵ The prosecutor's primary duties are "the prosecution of the guilty and the protection of the innocent,"⁶⁶ both basically judicial functions. Further, the office of prosecuting attorney is vested with a wide discretion "necessary for the vindication of the public interest."⁶⁷

The legal ethics committees of most bar associations have unequivocally condemned representation by prosecuting attorneys of litigants in controversies relating to matters with which they must deal in the performance of their official duties. The Virginia State Bar has stated:

An attorney's acceptance of the office of Commonwealth's Attorney disqualifies him from private practice insofar as such private practice relates to matters with which he must deal in the performance of his official duties, and he should not accept representation in any civil matter, the subject of which is within the scope of his official duties, until final disposition has been made of all reasonable possibilities of any present or future duty on his part.⁶⁸

There are other areas besides conflicts of interest which affect public prosecutors. The prosecuting attorney is under the same restrictions as a private practitioner with respect to trying his case in the public press. It would be improper for a public prosecutor, for example, to release to the press the details of a confession or to state to the press that the accused was guilty of many other crimes not related to the offense at hand.⁶⁹

It would also be highly improper for a public prosecutor to use the weight of his office to influence the outcome of civil litigation in which he is involved. For example, it would be improper for him

⁶⁴ *Ganger v. Peyton*, 379 F.2d 709, 713-14 (4th Cir. 1967).

⁶⁵ *Id.* at 714.

⁶⁶ *Id.*, citing *Bauers v. Heisel*, 361 F.2d 581, 590 (3d Cir. 1966) [citations omitted].

⁶⁷ *Id.*, citing *Bauers v. Heisel*, 361 F.2d 581, 590 (3d Cir. 1966).

⁶⁸ VA. S.B. COMM. ON LEGAL ETHICS, OPINIONS, No. 121 (1963).

⁶⁹ ABA CODE OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE [hereinafter cited as DR] 7-107.

to bring criminal charges against a husband when he is representing the wife in a divorce.⁷⁰ If a crime has actually been committed, it is the duty of the prosecutor to prosecute. In such a case he should withdraw from the civil litigation in which the accused is involved.

From all of the foregoing we can draw the following general rules or conclusions with respect to conflicts of interest so far as prosecuting attorneys are concerned:

(1) A prosecuting attorney may engage in private civil practice, but a lawyer who attempts to act in both capacities should not accept any private employment which is in any way inconsistent with or antagonistic to his public employment.

(2) A prosecuting attorney cannot undertake criminal defense in any court.

(3) A prosecutor cannot profit by information gained in the course of performance of his duties as such: he cannot participate in civil actions when an investigation involving the situation in question and alleged criminal offenses was conducted through his office.

(4) The prosecutor cannot ethically use the weight and force of his office to gain an advantage in private employment; for example, when he represents the wife in domestic relations matters and brings nonsupport or criminal charges against the husband. If a crime has been committed, the prosecuting attorney has a duty to prosecute, but he must withdraw from the civil matter. If no crime is involved, he violates the disciplinary rule which provides: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."⁷¹

(5) The prosecutor cannot represent a private client against a county commission, even in those counties where there is a separate county attorney.

(6) The prosecutor cannot represent a private client against a county board of education, even in those counties where the board of education has its own counsel.

⁷⁰ *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967); see ABA CODE OF PROFESSIONAL RESPONSIBILITY DRs 7-103, -105.

⁷¹ ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105.

(7) The prosecutor cannot represent a private client in condemnation proceedings against any state agency, the county, or the board of education.

(8) After he leaves office, the prosecutor cannot represent a defendant whose case originated, was investigated, or was passed upon while he was a prosecutor or a member of the prosecutor's staff.

(9) The foregoing rules apply to any lawyer associated with the prosecutor in private practice. A member of a firm or an associate cannot do that which any other member of the firm cannot do. If a member (or an associate) of a firm is on the prosecutor's staff, no other member of the firm nor an associate thereof may accept any employment which the member of the prosecutor's staff could not accept. Lawyers who only share offices, though not partners, have such a relation to one another as to bring canon 6 of the Canons of Ethics and canon 5 of the *Code of Professional Responsibility* into play.

(10) The prosecutor must comply with the disciplinary rule relating to the duties of a public prosecutor⁷² and the rule relating to trial publicity.⁷³

The rule which underlies all of the foregoing, of course, is set forth in canon 9 of the *Code of Professional Responsibility* which provides: "A lawyer should avoid even the appearance of professional impropriety."⁷⁴

The primary responsibility of a prosecuting attorney is essentially judicial, the prosecution of the guilty and the protection of the innocent.⁷⁵ Any representation which interferes with this responsibility is improper and should be avoided.

⁷² *Id.* DR 7-103.

⁷³ *Id.* DR 7-107.

⁷⁴ *Id.* CANON 9.

⁷⁵ *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967), quoting *Bauers v. Heisel*, 361 F.2d 581, 590 (3d Cir. 1966).